Nos. 88-1125 and 88-1309

In The

Supreme Court of the United States

October Term, 1988

No. 88-1125

JANE HODGSON, M.D., et. al.

Appellants,

vs.

THE STATE OF MINNESOTA,

Appellees.

No. 88-1309

THE STATE OF MINNESOTA,

Appellants,

vs.

JANE HODGSON, M.D., et. al

Appellees.

On Appeal From The United States Court
Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA AND BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC.

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

American Family Association, Inc. (AFA), Moving Party herein, respectfully moves this Honorable Court for an order granting leave to file the attached Brief Amicus Curiae. AFA has requested permission from Appellants by their attorney, Mr. William Z. Pentelovitch, Esq., and from Appellee, State of Minnesota, from its Attorney, Mr. Hubert H. Humphrey, III, Esq.

The attached Brief supports the position of the Appellee in this case. The issue before this Court concerning the constitutionality of the parental notification provision will significantly affect the position of Amicus as it seeks

to encourage the preservation of unborn children and to act to strengthen traditional American families.

INTEREST OF AMICUS CURIAE

The American Family Association, Inc., is a non-profit organization incorporated in 1977 under its original name National Federation for Decency, Inc. (NFD). AFA continues to operate as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. As Amicus, American Family Association, Inc., has members in all 50 states; over 520 chapters of local citizens who are active in offering individuals alternatives to abortions; and over 360,000 subscribers to its monthly newsletter, AFA Journal. Amicus

also provides counseling and referral services to pregnant women who seek alternatives to abortion.

The ability of a state to protect the welfare of all its citizens, including the unborn, is vital to the efforts of the American Family Association membership. American Family Association, Inc., seeks to promote a healthful family environment for all Americans and it recognizes the need to afford the unborn such an opportunity. The position of the American Family Association, Inc., will support the interest of the State of Minnesota to protect the lives of the unborn and to permit the State to act in a manner which will respect the traditional family structure.

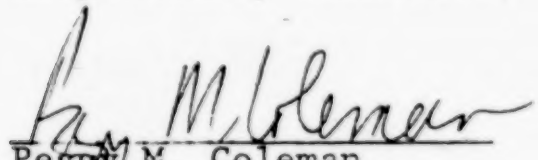
Serious efforts have been underway

to offer minors alternatives to abortions and AFA will continue to do so. In the interest of this educational process on behalf of AFA and its members concerning abortion alternatives this action is most important. The parties have written comprehensive arguments and AFA will not repeat them. Rather, AFA will highlight certain concepts it wishes the Court to consider.

The ability of AFA to continue to offer minors viable alternatives to abortion is fundamentally affected by the court's ruling. Amicus and the citizens they represent would be severely harmed by a finding that the parental notification provision is unconstitutional.

Therefore, AFA respectfully requests this Honorable Court to grant leave to file the attached Brief Amicus Curiae in this important case and to affirm the decisions of the court below.

Respectfully submitted,



Peggy M. Coleman
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LAW AND ARGUMENT

I. THE STATE MAY CONSTITUTIONALLY REQUIRE NOTIFICATION OF BOTH PARENTS OF A MINOR'S DECISION TO OBTAIN AN ABORTION.

A. Parental Notification is a Constitutionally Sound Response By The State For The Protection of Pregnant Minors.

The allegation on the part of the abortion providers that the parental notification requirement actually undermines family interest and communication for many minors is without foundation. Further, this allegation is based upon the false assumption that a minor has the same privacy interests as her adult counterpart.

The Court in Roe v Wade, 410 U.S. 113, 154 (1973), found that a pregnant

woman had a certain privacy right, "but that this right is not unqualified and must be considered against important state interests in regulation." The Court has found that the State's interests have outweighed the pregnant woman's privacy interests, even early in the term, in the use of public monies for abortions, Harris v McRae, 448 U. S. 297 (1980); in the requirement that the abortion be based upon "informed consent," Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1976), and in the prohibition of the use of public facilities or public employees to perform abortions, Webster v Reproductive Health Services, ____ U.S. ____ 57 U.S.L.W. 5023 (1989). It is abundantly clear that the privacy right which has been attached to a woman's decision to

abort a child is limited by certain state interests.

While there has appeared to be a lack of continuity or cohesiveness in the decisions addressing abortion regulation, two underlying principles emerge which may be helpful to the present analysis. First, the State may treat the abortion procedure as it does any other medically similar procedure. Second, the State should be able to treat minors differently from adults who seek an abortion.

Applying the first premise, based upon the interest of the State to regulate medical procedures, the State may impose certain restrictions and notice requirements on medical practitioners. The State requires that before a medical professional removes a

child's tonsils or her appendix he must obtain permission from the parent or guardian. If a child wishes to have her ears pierced, the practitioner must obtain permission from the child's parents or guardian. To suggest that the health interests of the State are less in the case of a child undergoing an abortion than they are when she has her ears pierced is to acquiesce to the absurd.

Second, this Court has long recognized that children and adults may be treated differently under the law and that there is a different protection under the Constitution for children than for adults. In the present case, there are several recognized rights which must be considered. The first is the right of the parents to "establish a home and

bring up children". Meyer v Nebraska, 262 U.S. 390, 399 (1923). The second interest is that of the State in "safeguarding the physical and psycholcgical well-being of a minor." Globe Newspaper Co. v Superior Court, 457 U.S. 596 (1982). The State may require a child to receive educational instruction, Wisconsin v Yoder 406 U.S. 205 (1972); it may prohibit children from being used in production of sexually explicit material, New York v Ferber, 458 U.S. 747 (1982); and it may limit the duration and type of employment in which a child may engage, Prince v Massachusetts, 321 U.S. 158 (1944). In his dissent in Danforth Justice Stevens noted:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the

> consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel when he pleases, or even attend the exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman's already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.

428 U.S.at 102.

Finally, this Court has recognized that minors are entitled to certain protections afforded under the Constitution. Goss v Lopez, 419 U.S. 565 (1975); In re Gault, 387 U.S. 1 (1967); and Tinker v Des Moines School District, 393 U.S. 303 (1969). These Constitutional rights are limited by

virtue of the condition of the person's minority.

Without precedent this Court has acknowledged a distinction between "mature" minors and "immature" minors. Bellotti v Baird, 443 U.S. 622 (1979); City of Akron v Akron Center for Reproductive Health, 462 U.S. 416 (1983). This distinction, however, is not upheld elsewhere in the law.

The courts have not engaged in an analysis based upon the rights of a "mature" versus an "immature" minor in these areas. The debate concerning a "mature" versus an "immature" minor in these circumstances was properly conducted by the Minnesota legislature when it fixed the age of majority. The same is true with respect to the requirement of parental notification.

The legislature found, as evidenced by the statute, that those women under the age of eighteen are immature for the purpose of this statute and must be afforded greater protection. To judicially carve out a subset from the class of minors is an act of assumption of legislative right and authority.

The Court in reviewing the parental notification provision must balance the interests of the state in the child's welfare and the interest of parents in the upbringing of the child against the child's privacy interests in obtaining an abortion. Mr. Justice Stevens, in his dissent, provided an eloquent analysis of the role parents play in a minor's decision making process in Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1986).

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents, An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster the welfare by helping a pregnant distressed child to make and to implement a correct decision.

428 U.S. at 103-04.

This same reasoning is applicable to the present parental notification provision.

The parents are under a legal obligation to care for the child and may be otherwise legally responsible for the child. To require a parent to support a child and have legal responsibilities for the child while preventing or facilitating the prevention of a parent's role in the child's decision to procure an abortion is inconsistent if not irrational.

In Yoder, 406 U.S. 205, 232 (1972). this Court stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parent in the upbringing of their children is now established beyond debate

as an enduring American tradition." It is this tradition and function of parenting which is being assaulted by the attempt to eliminate parental notification in favor of notification only to a judicial officer.

B. The Two-Parent Notice Requirement Is Not Unduly Burdensome.

The Eighth Circuit concluded that "[b]y providing for judicial by-pass, the statute safeguards those minors for whom parental involvement may not be in this best interest while at the same time encouraging parental involvement for those minors who may be greatly assisted at a difficult time. We cannot conclude the two-parent notice requirement imposed in conjunction with a bypass option unduly burdens the right of a mature or

best interests minor to obtain an abortion." Hodgson v State of Minnesota, 853 F.2d 1452, 1464 (8th Cir. 1988).

The statute requires notice be given to both parents, if living, or one parent if one is dead or cannot be located through reasonably diligent efforts. Minn. Stat. Ann. §144.343(3). The abortion providers attack the two-parent notice requirement on two bases. First, the abortion providers alleged that the statute is unduly burdensome because of the statistical incidence of divorced or never-married biological parents. Second, the Court heard their allegations that such notification requirements were harmful to the minor particularly in a dysfunctional family.

The Court below noted:

Although some parents may be

> abusive, or at best unhelpful to their minor child faced with the decision whether to have an abortion, that is hardly a reason to discard pages of experience teaching that parents generally do as in their child's best interests. ***. While the District Court found that the non-custodial parent often has little communication with the child, this does not mandate completely casting aside the principles enunciated by the Supreme Court as to the parental role, which apply to non-custodial parents as well as custodial parents.

853 F.2d at 1464.

The argument which is based upon the absence of one parent through divorce or failure to marry versus the notification requirement as an instrument for compelling a certain degree of participation by the non-custodial parent. The statute merely requires notification or a good faith attempt to reach the non-custodial parent. The fact

that a number of minors who seek an abortion do not have regular contact with both parents should not be viewed as an overriding reason to thwart the State's efforts to uphold parental involvement in the child's decision making process.

The State's interests in promoting the general societal welfare are furthered through encouraging and supporting a two-parent family unit, even to the extent those family units may be fractured or may have never legally bonded.

Therefore, since certain minors seeking an abortion may be required to take an additional step prior to the abortion, such a requirement is clearly for the benefit of children and their parents and is not unduly burdensome.

II. THE STATE MAY CONSTITUTIONALLY REQUIRE NOTIFICATION OF A MINOR'S PARENTS 48 HOURS PRIOR TO PERFORMING AN ABORTION.

The Eighth Circuit found that "[c]onsidering the statute as a whole, the 48-hour delay requirement is not a significant burden upon the minor's abortion rights." 853 F.2d at 1465. The primary objection raised to the waiting period requirement has been with respect to external factors such as travel time, scheduling conflicts and weather conditions that may result in a delay of a week or more.

The statute merely prohibits an abortion being performed on a minor until after 48 hours from written notice to the parents. Minn. Stat. Ann §144.343(2). As the Court below noted, the minor is not prohibited from scheduling the

appointment or traveling to the area in which the abortion facility is located prior to the completion of the notification process. 853 F.2d at 1465.

The abortion providers stated that a delay of a period of a week would burden the minor because the pregnancy would have progressed into the second trimester and the minor would face additional costs, inconvenience and risk. As to the effect these factors have on the constitutionality of the statute, only the risk to the minor's health is particularly significant. Such an evaluation of the health risk to the minor in relation to the privacy rights involved in procuring an abortion is best left to the Minnesota legislature. The evidentiary process necessary to make such a determination is best undertaken

in a public hearing before a duly elected legislative body.

As to the two other concerns raised in the objection to a parental delay, the additional cost associated with certain regulations of abortion was recently addressed by this Court in Webster v Reproductive Health Services, ____ U.S. ____, 57 U.S.L.W. 5023 (1989). The Court noted that "the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the validity of the fetus. ***. But we are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life, and we therefore believe §188.029 to be Constitutional." 57 U.S.L.W. at 5031.

The District Court found that the

cost for an abortion in the first trimester (under 12 weeks gestation) was $225. The cost for an abortion performed from the twelfth through the fourteenth week of pregnancy was $275. Hodgson v State of Minnesota, 678 F.Supp. 756, 761 (D.Minn. 1986). Applying the abortion providers' argument the increase in cost caused by the delay described would be $50. Such an increase can hardly be said to be burdensome particularly in light of the fact that the court in Webster upheld the viability-testing regulation which would have added $125 to $250 to the cost of an abortion. 57 U.S.L.W. at 5029.

The final reason cited as an undue burden is the inconvenience the minor will be subject to by the delay. The State is permitted to make a value judgment which favors childbirth over

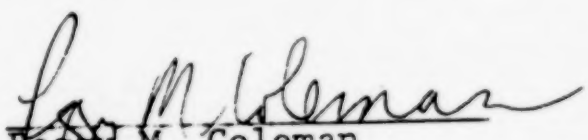
abortion Maher v Roe, 432 U.S. 464, 474 (1977). Any inconvenience a minor may encounter as a result of the 48-hour waiting period is a reflection of the State's responsibility to protect its children and a value judgment to favor childbirth over abortion. To suggest that the State has a Constitutional duty to provide a minor the opportunity to procure an abortion free from inconvenience is an affront to the Constitution and to the millions of individuals who diligently strive to protect unborn life.

CONCLUSION

Parental notification and a reasonable waiting period are Constitutionally sound regulations the State of Minnesota may implement to protect minors and to preserve the family unit.

For these reasons, in addition to those urged by Appellant herein, the decision below should be corrected and reversed.

Respectfully submitted,
American Family
Association, Inc.



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this third day of August, 1989, to the following counsel of record:

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All parties required to be served have been served.

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